

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ASVNINI PATEL and PRAVNIA PATEL,) Case No.: C 13-748 PSG
Plaintiffs,)
v.)
U.S. BANK, N.A. et al.,) **ORDER GRANTING DEFENDANTS'**
Defendants.) **MOTION TO DISMISS AND MOTION**
) **TO EXPUNGE**
) **(Re: Docket Nos. 8, 9, 11)**

In this foreclosure action, Defendants U.S. Bank, N.A., et al, (“Defendants”) move to dismiss the complaint filed by Plaintiffs Asvini Patel, et al (“the Patels”) pursuant to Fed. R. Civ. P. 12(b)(6). Defendants also move to expunge the lis pendens notice placed on the deed for the subject property and for judicial notice of certain documents. Having considered the parties’ papers and oral arguments, the court GRANTS Defendants’ motion to dismiss and the motion to expunge.

I. BACKGROUND

Except where otherwise noted, the court draws the following facts, taken as true for the purposes of a motion to dismiss, from the Patels' complaint.¹

On October 13, 2006, the Patels recorded a Deed of Trust (“DOT”) in the Monterey County Recorder’s Office against a property located at 24660 Vereda Corta, Salinas, California 93908 (the “Property”). The DOT secured a Promissory Note in the amount of \$1,500,0000 in favor of

¹ See Docket No. 1.

American Brokers Conduit ("ABC") as the original lender. The DOT named United Capital Title Company ("United") as the trustee. MERS was named as the beneficiary as nominee for ABC.

On or about January 16, 2007, ABC securitized and sold the Patels' Note and its beneficial interest in the DOT to "2007-1 Mortgage Pass-Through Certificates, Series 18 2007-1," ("2007-1 Trust") a security trust with Defendant U.S. Bank, N.A. ("U.S. Bank") as trustee. The securitization and sale took effect pursuant to a pooling and services agreement ("PSA"). No notice of the securitization was provided to the Patels, nor were the Patels in default at the time of the securitization. ABC retained at most the servicing rights, but later transferred those rights to Defendants Wells Fargo Bank, N.A. ("Wells Fargo"), and/or Homeward Residential, Inc. ("Homeward"), who proceeded to collect the Patels' mortgage payments, at least for a time.

On March 25, 2010, the Patels defaulted on their loan obligations, and a notice of default was recorded against the Property.²

On or about April 29, 2010, a substitution of trustee was recorded. This document was signed by Theresa Esposito ("Esposito"), purportedly as Vice President of U.S. Bank, and Carolyn White ("White"), purportedly as Assistant Vice President of U.S. Bank. Through this document U.S. Bank purports to substitute Power Default Services, Inc. ("PDS") as DOT trustee in place of original trustee, United. Even though Esposito and White hold themselves out as authorized representatives of U.S. Bank, they are, according to the Patels, also robo-signers who have no personal knowledge of the facts pertaining to the Patels' DOT and beneficial interest, and were never properly authorized to act on behalf of the true beneficiaries of the note and DOT.

The Patels failed to cure their default, and on June 25, 2010 a notice of trustee's sale was recorded against the Property.³

² See Docket No. 9 Ex. B.

³ See *id.* Ex. E.

1 There was no recorded assignment of the beneficial interest until July 6, 2010, well after the
2 security trust closed. The beneficial interest in the DOT initially was assigned from Mortgage
3 Electronic Registration Systems, Inc. (“MERS”) to Homeward (formerly known as American
4 Home Mortgage Servicing, Inc.)⁴ and from Homeward to U.S. Bank.⁵ The document assigning
5 the interest was signed by Andrew Fuerstenberger (“Fuerstenberger”) and Kathy Smith (“Smith”),
6 as officers of MERS, but the Patels again allege that Fuerstenberger and Smith actually were
7 employees of U.S. Bank and merely robo-signers for MERS.
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9 The notice of default recorded on March 25 was later rescinded, and a notice of rescission
10 was recorded on August 3, 2012.⁶
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12 The Patels remained in default on their loan obligations, and another notice of default
13 (“NOD 2”) was recorded against the Property on October 19, 2012.⁷ The NOD 2 was signed by
14 David Lopez, on behalf of PDS, as agent for beneficiary.⁸ The NOD 2 was accompanied by a
15 Declaration of Due Diligence pursuant to Cal. Civil Code § 2923.5(b) and signed by Nurfeta
16 Beklic as Vice President for an unknown business entity.
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18 On October 23, 2012, PDS served a Debt Validation Notice on behalf of U.S. Bank and
19 Homeward stating that the Patels’ loan had been referred to PDS for foreclosure.
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21 On January 16, 2013, the Patels filed this suit and assert seven causes of action: (1) breach
22 of express agreements; (2) breach of implied agreements; (3) slander of title; (4) violation of
23 California Civil Code § 2923.5; (5) wrongful foreclosure; (6) violation of the RICO statute; and (7)
unfair business practices.
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⁴ See Docket No. 1 ¶ 24; Docket No. 9 Ex. C.

⁵ See Docket No. 1 ¶ 25; Docket No. 9, Ex. D.

⁶ See Docket No. 9 Ex. F.

⁷ See Docket No. 9 Ex. G; *see also* Docket No. 1 ¶ 27.

⁸ See Docket No. 1 ¶ 27.

II. LEGAL STANDARDS

A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁹ If a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face,” the complaint may be dismissed for failure to state a claim upon which relief may be granted.¹⁰ A claim is facially plausible “when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹¹ Accordingly, under Fed. R. Civ. P. 12(b)(6), which tests the legal sufficiency of the claims alleged in the complaint, “[d]ismissal can based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”¹²

On a motion to dismiss, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party.¹³ The court's review is limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice.¹⁴ However, the court need not accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.¹⁵ "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment."¹⁶

⁹ Fed. R. Civ. P. 8(a)(2).

¹⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

¹² *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1990).

¹³ See *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

¹⁴ See *id.* at 1061.

¹⁵ See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); see also *Twombly*, 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a motion to dismiss).

¹⁶ *Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

1 **III. DISCUSSION**

2 **A. Request for Judicial Notice**

3 Defendants request judicial notice of the following: foreclosure-related documents recorded
 4 in the Monterey County Recorder's Office (Exs. 1-7).¹⁷ The Patels object to judicial notice of
 5 disputed facts contained in the documents.¹⁸

6 The court may take judicial notice of a "fact that is not subject to reasonable dispute
 7 because it is generally known . . . or can be accurately and readily determined from sources whose
 8 accuracy cannot reasonably be questioned."¹⁹ The court notes that the copy of the DOT
 9 Defendants submitted appears to be identical to the copy of the DOT that the Patels attached to
 10 their state court complaint and so judicial notice of that document is appropriate.²⁰ Defendants
 11 have not requested that the court take notice of disputed facts within the documents, and the court
 12 will not rely on facts contained therein that reasonably may be subject to dispute.²¹ The
 13 authenticity of the foreclosure-related documents is not in dispute and may be verified by resort to
 14 the public record.²² Defendants request for judicial notice is GRANTED as to the all of the
 15 documents.

16 **B. Breach of Express Agreements**

17 The Patels contend that Defendants breached the DOT and the PSA by failing to record the
 18 assignment of the beneficial interest in the DOT within 90 days of the close of the DOT. Plaintiffs

21 ¹⁷ See Docket No. 9.

22 ¹⁸ See Pls.' Objections to Defs.' Request for Judicial Notice (Docket No. 18-2).

23 ¹⁹ Fed. R. Evid. 201(b).

24 ²⁰ See Docket No. 1 Ex. B.

25 ²¹ See *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (finding the district court erred
 26 in relying on disputed facts contained within documents that otherwise were the proper subject of
 27 judicial notice). See also Fed. R. Evid. 201(b).

28 ²² See Fed. R. Ev. 201(b)(2).

1 bringing a breach of contract claim must allege (1) “the contract,” (2) their “performance or excuse
 2 for nonperformance,” (3) the defendants’ breach, and (4) damage to the plaintiffs from the
 3 breach.²³

4 As to the DOT part of their claim, even assuming a DOT serves as a contract, the Patels do
 5 not and cannot allege that they themselves performed under the contract.²⁴ Nor do they offer any
 6 excuse for their nonperformance. Separately, the Patels contend that Defendants breached the
 7 power of sale requirements in paragraph 22 of the DOT because they were not in default when the
 8 DOT was assigned in March 2010, first from ABC to Homeward and then from Homeward to U.S.
 9 Bank. But a plain read of paragraph 22 makes clear that the default and notice provisions of
 10 paragraph 22 apply to a sale of the property, not a transfer of the beneficial interest in the DOT.
 11 Paragraph 20 applies to this later transfer, and it is explicit that “[t]he Note or a partial interest in
 12 the Note (together with [the Deed of Trust]) can be sold one or more times without prior notice to
 13 Borrower.”²⁵ When the power of sale was actually invoked, a notice of default was properly
 14 recorded, on October 19, 2012.

15 As to the PSA part, the Patels do not allege that they are parties to the PSA, only that
 16 because Defendants violated the PSA they were harmed. That set of factual allegations is
 17 insufficient under a breach of express contract theory. The Patels also fail to attach a copy of the
 18 securitization agreement to their complaint or set out the agreement’s terms in the body of their
 19 complaint, further dooming their claim.²⁶

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²³ *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008).

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²⁴ See *Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002); *Cross v. Downey Savings & Loan Ass’n*, Case No. CV 09-317 CAS (SSx), 2009 WL 481482, at *2 (C.D. Cal. Feb. 23, 2009).

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²⁵ Docket No. 9 Ex. A ¶ 20.

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²⁶ See *Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307 (1999) (holding that if a claim is based upon an “alleged breach of a written contract, the terms must be set out verbatim in the

1 **C. Breach of Implied Agreement**

2 In addition to reframing their ill-considered express power-of-sale claim as an implied
 3 breach claim, the Patels also bring an implied breach claim based on the supposed failure to record
 4 the assignments of the DOT. It is undisputed, however, that both the assignment to Homeward and
 5 the assignment to U.S. Bank were recorded, on July 6, 2010. Even if this were not the case,
 6 California law does not require the recording of these assignments in order to non-judicially
 7 foreclose.²⁷ The Patels also contend Defendants, and in particular Homeward and Wells Fargo,
 8 breached an implied “obligation” by refusing to honor some type of indemnification obligation
 9 created by their enforcement of the power of sale clause. The Patels’ factual allegations, however,
 10 do not support the existence of any such implied agreement because they reveal nothing about the
 11 nature of this obligation or how it was reached by the parties.

13 **D. Slander of Title**

14 The Patels allege slander of title in connection with the recorded notice of default, the
 15 notice of trustee’s sale, the substitution of trustee and the assignment of the DOT. Slander of title
 16 “occurs when a person, without a privilege to do so, publishes a false statement that disparages title
 17 to property and causes pecuniary loss.”²⁸ “The recordation of an instrument facially valid but
 18 without underlying merit will give rise to an action for slander of title.”²⁹ To state a claim for
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 23 body of the complaint or a copy of the written agreement must be attached and incorporated by
 24 reference”).

25 ²⁷ See *Estillore v. Countrywide Bank FSB*, Case No. CV F 10-1243 LJO GSA, 2011 WL 348832, at *15 (E.D. Cal. Feb. 2, 2011); *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 122 (2011).

26 ²⁸ *Truck Ins. Exchange v. Bennett*, 53 Cal. App. 4th 75, 85 (1997).

27 ²⁹ *Stamas v. City of Madera*, 795 F. Supp. 2d 1047, 1068 (E.D. Cal. 2011) (citing *Seely v. Seymour*, 190 Cal. App. 3d 844, 857 (1987)). See also *Ogilvie v. Select Portfolio Servicing*, 12-CV-001654-DMR, 2012 WL 3010986, at *3 (N.D. Cal. July 23, 2012).

1 slander of title, the Patels must allege: “1) a publication, 2) which is without privilege or
 2 justification, 3) which is false, and 4) which causes direct and immediate pecuniary loss.”³⁰

3 Defendants challenge the Patels’ slander of title claim on a number of grounds. Defendants
 4 first argue that the Patels cannot allege falsity because U.S. Bank was the duly authorized trustee
 5 under the DOT and so Cal. Civ. Code § 2924(a) entitled it to initiate non-judicial foreclosure
 6 proceedings. Defendants argue that the Patels must allege facts that, if true, show the foreclosing
 7 entity was not assigned the relevant debt in any manner.³¹ Defendants also argue that the Patels
 8 cannot state a claim for slander of title because the recordation of the notice of default is privileged
 9 under Cal. Civ. Code § 47(c)(1) pursuant to Section 2924(d)(1). Finally, Defendants dispute that
 10 the Patels have sufficiently alleged any direct pecuniary loss.

12 The Patels respond first that falsity is alleged because the signatures on the relevant
 13 documents are of “robo-signers” who lacked the legal capacity to sign, rendering the documents
 14 invalid. As will be explored below, the Patels also argue that there was no interest to assign in the
 15 DOT based on the transfer dates and the dissolution of the security trust. With respect to the
 16 qualified common interest privilege, the Patels further respond that Section 47(c)(1) protects only
 17 communications made without malice.³² The Patels argue that U.S. Bank acted in reckless
 18 disregard of their rights when its employees signed documents without legal authority that they
 19 knew would initiate a foreclosure process to which U.S. Bank was not entitled. The Patels further
 20 allege that without legally authorized signatures and without a legitimate transfer of beneficial
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³⁰ *Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal. App. 4th 1040, 1051 (2009).

³¹ See *Gomes*, 192 Cal. App. 4th at 1154 (holding that Cal. Civ. Code § 2924 does not provide for judicial action in order to determine whether a nominee is authorized to initiate foreclosure on behalf of the noteholder); *Herrera v. Fed. Nat. Mortg. Ass'n*, 205 Cal. App. 4th 1495, 1506 (2012).

³² See *Kachlon v. Markowitz*, 168 Cal. App. 4th 316, 336 (2008).

1 interest, the notice of default, the notice of trustees' sale and the remaining documents are invalid,
2 null and void, and therefore improperly cloud the title of the Property.

3 The Patels have pled sufficiently the first three elements of their claim. Defendants do not
4 dispute that at a minimum the publicly-recorded notice of default and notice of trustees' sale
5 constitute "publication" under the statute. The court also must accept as true at least the Patels'
6 allegations regarding falsity that they base on false signatures or unauthorized signatures.
7 Defendants do not challenge these allegations. This is sufficient to state the falsity element of the
8 slander of title claim.³³

9 With respect to privilege, Section 47(c)(1) defines a privileged communication, among
10 others, as a "communication, without malice, [made] to a person interested therein (1) by one who
11 is also interested." The statutorily-required notices in nonjudicial foreclosure procedures are
12 privileged communications under the qualified common-interest privilege of Section 47.³⁴ Malice
13 as an exception to the privilege doctrine may be established by a showing that the defendant
14 "lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless
15 disregard of the plaintiff's rights."³⁵

16 The Patels allege that malice is established by the recording of the documents by those who
17 were aware that they could not be the true beneficial interest holder of the DOT. They further
18 allege that U.S. Bank could not be the true beneficial interest holder of the DOT because the
19 original lender ABC failed in its attempt to assign the beneficial interest first to the Homeward (at
20 the time known as AHMSI) and then from Homeward to U.S. Bank. The Patels claim that the
21 assignments failed because the PSA required the assignments to be completed within 90 days of its
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³³ See, e.g., *Ogilvie*, 2012 WL 3010986, at *3.

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27³⁴ See *id.* at *4; 168 Cal. App. 4th at 333.

28³⁵ 168 Cal. App. 4th at 336 (citations omitted).

1 closing, which according to the Patels occurred in January 2007, but the assignments were only
 2 recorded in July 2010. The Patels, however, appear to conflate “assignment” and “recording.”³⁶
 3 The assignment involves the transfer of rights; the recording publishes that transaction.³⁷
 4 Nevertheless, because the Patels sufficiently allege that the assignments themselves occurred in
 5 March 2010,³⁸ which they claim was after the 2007-1 Trust could accept the beneficial interest, and
 6 because Defendants do not address malice in their papers, the Patels’ claim regarding malice passes
 7 muster.

8 The Patels nevertheless fail to state a “direct and immediate” pecuniary harm as a result of
 9 the alleged false publication. The monetary harm pled in the complaint is based on the alleged
 10 “impair[ment] of vendibility” to the Property, as well as Plaintiffs’ need to retain attorneys and file
 11 suit in order “to cancel the instruments casting doubt on Plaintiff’s title.”³⁹ The Patels, however,
 12 have not alleged any sale that they were unable to complete because of the alleged cloud on their
 13 title, nor do their claims in this action suffice as “quiet title” causes of action for which they could
 14 be entitled to attorneys’ fees. Their allegations of harm are insufficient in a claim for slander of
 15 title because “fees incurred to quiet title are recoverable and fees incurred prosecuting the slander
 16 of title are not.”⁴⁰

17 **E. Section 2923.5**

22 ³⁶ See Docket No. 1 ¶ 22 (noting there was no “recorded assignment until July 6, 2010”).

23 ³⁷ Cf. *In re Salazar*, 470 B.R. 557, 561 (S.D. Cal. 2012) (noting that for deeds of trust, it is
 24 unnecessary for an assignment to be recorded before initiation of foreclosure proceedings, thereby
 25 underscoring the difference between the two actions).

26 ³⁸ See Docket No. 1 ¶ 24.

27 ³⁹ Docket No. 1 ¶¶ 33, 34.

28 ⁴⁰ *Ogilvie*, 2012 WL 3010986, at *4.

1 Cal. Civ. Code § 2923.5 imposes various requirements before a notice of default can be
 2 recorded pursuant to Cal. Civ. Code § 2924. These requirements include an obligation to contact
 3 the borrower in advance and to file a declaration of compliance.

4 These requirements, however, only apply to property that is owner-occupied. The Patels do
 5 not allege that the Property is “owner-occupied,” as defined by the statute.⁴¹ Their claim fails as a
 6 result.

7 **F. Wrongful Foreclosure**

8 Wrongful foreclosure is an action in equity in which the mortgagor or trustor seeks to
 9 unwind an “illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of
 10 sale in a mortgage or deed of trust” – or to prevent such a sale from occurring.⁴² The plaintiff must
 11 demonstrate prejudice or harm and, depending on whether the plaintiff is challenging a sale or
 12 seeking to prevent a pending sale, may be required to tender payment of the debt, or at least to
 13 allege the ability to tender payment.⁴³

14 The court initially must note that the Patels concede that no sale of the Property has yet
 15 taken place and do not allege they have tendered the full amount of their outstanding obligation.

16 ⁴¹ See Cal. Civ. Code § 2923.5(i) (“This section shall apply only to mortgages or deeds of trust
 17 recorded from January 1, 2003, to December 31, 2007, inclusive, that are secured by owner-
 18 occupied residential real property containing no more than four dwelling units. For purposes of this
 19 subdivision, ‘owner occupied’ means that the residence is the principal residence of the borrower
 20 as indicated to the lender in loan documents.”).

21 ⁴² *Permito v. Wells Fargo Bank, N.A.*, Case No. C-12-00545 YGR, 2012 WL 1380322, at *3 (N.D.
 22 Cal. Apr. 20, 2012) (quoting *Lona v. Citibank N.A.*, 202 Cal. App. 4th 89, 104 (2011)).

23 ⁴³ There is some division in the courts as to whether the “tender rule” precludes a claimant from
 24 seeking to prevent a pending nonjudicial foreclosure, as opposed to attempting to “unwind” a
 25 foreclosure that has taken place. *See Rodriguez v. Bank of America*, No. C 11-3839-PSG, 2011
 26 WL 5864108, at *3 (N.D. Cal. Nov. 22, 2011). Cf. *Silva-Pearson v. BAC Home Loans Servicing*,
 27 *LP*, No. C 11-1491 SI, 2011 WL 2633406, at *2 (N.D. Cal. July 6, 2011) (finding no basis for the
 28 “tender rule” in an action challenging a pending foreclosure, as opposed to the commonly-cited
 line of cases requiring tender based on an attempt to set aside foreclosure); *Yazdanpanah v.
 Sacramento Valley Mortg. Group*, C 09-2024 SBA, 2009 WL 4573381, at *7 (N.D. Cal. Dec. 1,
 2009) (dismissing claim for wrongful foreclosure on grounds that “debtor must allege a credible
 tender of the amount of the secure debt” regardless of pending or past status of foreclosure).

1 Defendants do not, however, raise the “tender rule” as a basis for seeking dismissal of the wrongful
 2 foreclosure claim. Courts moreover have recognized various exceptions to the tender rule,
 3 including based on an allegation that a foreclosure sale is totally void and not merely voidable due
 4 to, for example, a notice error.⁴⁴ Under these circumstances, the court cannot find error in the
 5 Patels’ failure to allege compliance with the tender rule.

6 Turning to whether Defendants’ initiation of the nonjudicial foreclosure process was illegal,
 7 the heart of the Patels’ claim is that neither the trustee nor the beneficiary had the authority to
 8 invoke the power of sale or right to foreclose by virtue of the improper transfer of the beneficial
 9 interest to U.S. Bank. Once again, the Patels highlight the timing of the purported assignment of
 10 the beneficial interest to U.S. Bank in violation of the PSA. The only substantive argument
 11 Defendants present in their two briefs is that the Patels lack standing to bring such a challenge. But
 12 this court and others have rejected the notion that a plaintiff is barred from bringing a wrongful
 13 foreclosure claim based on a defect in the chain of title.⁴⁵

14 Finally, the Patels allege that if Defendants proceed with the foreclosure sale, Plaintiffs will
 15 be subject to the wrongful loss of their home.⁴⁶ Defendants have not challenged this allegation as
 16 inadequate. As expressed by the court in *Tamburri*, “the threat of foreclosure by the wrong party
 17 would certainly be sufficient to constitute prejudice to the homeowner because there is no power of
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 22⁴⁴ See *Tamburri v. Suntrust Mortg., Inc.*, No. C-11-2899-EMC, 2011 WL 6294472, at *4-5 (N.D. Cal. Dec. 15, 2011) (finding multiple “exceptions and qualifications counsel against a blanket requirement of the tender rule at the pleading stage” based on a review of state and federal case law). See also *Ogilvie*, 2012 WL 3010986, at *6 (declining to apply the tender rule at the early pleading stage); *ING Bank v. Ahn*, No. C-09-995-TEH, 2009 WL 20893965, at *2 (N.D. Cal. July 13, 2009) (same).

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 25⁴⁵ See, e.g., *Mena v. JP Morgan Chase Bank, N.A.*, Case No. 12-1125 (PSG), 2012 WL 3987475, at *3 (N.D. Cal. Sept. 7, 2012); *Tamburri v. Suntrust Mortg., Inc.*, No. C-11-2899-EMC, 2011 WL 6294472, at *4-5 (N.D. Cal. Dec. 15, 2011); *Sacchi v. Morg. Elec. Registration Sys., Inc.*, No. CV-11-1658 AHM (CWx), 2011 WL 2533029, at *7-8 (C.D. Cal. June 24, 2011).

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 27⁴⁶ See Docket No. 1 ¶ 40.

1 sale without a valid notice of default.”⁴⁷ The prospect of wrongful foreclosure stemming from the
 2 issuance of foreclosure not grounded in a valid, beneficial interest is thus sufficient.

3 In sum, because the Patels have stated a facially plausible claim that the nonjudicial
 4 foreclosure process was not founded on a valid, beneficial interest they may pursue their wrongful
 5 foreclosure claim.

6 G. RICO

7 The Patels allege that Defendant violated 18 U.S.C. § 1962, although they do not specify
 8 under which section the claims arise. Because their allegations refer to Section 1962(d) but also
 9 suggest that Defendants engaged in activity prohibited by Section 1962(a), the court considers their
 10 allegations under the rubrics of both Section 1962(a) and Section 1962(d). In either case, their
 11 claims fail.

13 To state a claim under Section 1962(a), the Patels must allege that (1) “a person receives
 14 income derived directly or indirectly form a pattern of racketeering activity or unlawful debt”; (2)
 15 “that person uses or invests, directly or indirectly, any part or proceeds of such income in the
 16 acquisition of any interest in, or the establishment or operation of any enterprise”; and (3) “that
 17 enterprise is engaged in or its activities affect interstate or foreign commerce.”⁴⁸ The Patels also
 18 must allege “that the investment of racketeering income was the proximate cause of his injury.”⁴⁹

20 To state a claim under Section 1962(d), on the other hand, they need not allege any action in
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 24 ⁴⁷ *Tamburri*, 2011 WL 6294472 at *14 (citing *Castillo v. Skoba*, No. 10cv1838 BTM, 2010 WL
 25 3986953, at*2 (S.D. Cal. Oct. 8, 2010) (“The power of sale in a nonjudicial foreclosure may only
 26 be exercised when a notice of default has first been recorded.... [A]ny foreclosure sale based on a
 void notice of default is also void.”) (citing Cal. Civ. Code § 2924; 5–123 California Real Estate
 Law & Practice § 123.01).

27 ⁴⁸ *Jalili v. Far East Nat. Bank*, Case No. C 12-5962 SBA, 2013 WL 1832648, at *3 (N.D. Cal. May
 1, 2013).

28 ⁴⁹ *Id.*

furtherance of a RICO violation.⁵⁰ They are required only to allege that Defendants agreed to act in a way that violates one of the other sections of 18 U.S.C. § 1962.⁵¹

Under either provision, the Patels also must allege that Defendants engaged in or agreed to engage in one of the activities listed in 18 U.S.C. § 1961(a) as a predicate act of racketeering.⁵² If the predicate act of racketeering involves fraud, the Patels are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b).⁵³

Defendants assert that the Patels fail to allege facts sufficient to state a RICO claim. The Patels' allegations regarding the underlying racketeering activity appear to address two types of fraudulent conduct on the part of Defendants. First, they appear to claim that Defendants' failure to inform them of the securitization of the loan instrument was a fraudulent omission on which they relied to their detriment.⁵⁴ Second, the Patels claim that Defendants engaged in "the theft of real property through illegal foreclosure liens."⁵⁵ They allege that through the securitization of loans, Defendants conspired to upend traditional recording requirements, and then through the use of the mail and the internet, they filed documents with false claims regarding their interests in the properties upon which they sought to foreclose.⁵⁶

Although the Patels' complaint contains an exposition of the ills that the banking industry, including Defendants, have wrought on the American economy, the judicial system, and

⁵⁰ See *Salinas v. United States*, 522 U.S. 52, 63 (1997).

⁵¹ See *id.* at 64.

⁵² See *Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., Inc.*, 711 F. Supp. 1016, 1021 (E.D. Cal. 1989).

⁵³ See *id.*

⁵⁴ See Docket No. 1-1 ¶¶ 71-79.

⁵⁵ *Id.* at ¶ 82.

⁵⁶ See *id.* at ¶¶ 80, 83-84, 91.

1 homeowners,⁵⁷ it fails to include the details of the alleged mail and wire fraud supposedly giving
 2 rise to the RICO claim.⁵⁸ Rule 9(b) requires the Patels to state “the time, place, and specific
 3 content of the false representations as well as the identities of the parties to the
 4 misrepresentation.”⁵⁹ The Patels’ allegations fail to meet this standard. As a preliminary matter,
 5 their shift between the types of fraud on which they base their RICO claims already reveals that
 6 they have not alleged with specificity the predicate acts. Is the RICO claim based on the allegedly
 7 fraudulent omission regarding the securitization of the loan or is it based on alleged
 8 misrepresentations about the proper beneficiary of the loan? The complaint does not provide the
 9 answer.

10 The allegations the Patels do make further reveal that they have failed to meet the
 11 requirements of Rule 9(b). For example, they assert that “[a] separate count of Mail Fraud took
 12 place each and every time a fraudulent pleading, Affidavit, Promissory Note assignment, mortgage
 13 or mortgage assignment was sent by a Defendant through the use of the US [sic] mail.”⁶⁰ Nothing
 14 in that statement explains which documents were fraudulent, which defendants sent the fraudulent
 15 documents, when they sent the document, or what in the documents was false. Another example
 16 highlights the broad generalization of the Patels’ complaint. They assert that “[t]hese Defendants
 17 intentionally participated in a scheme to defraud everyone, including the Plaintiffs” and that they
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 22 ⁵⁷ See, e.g. *id.* at ¶ 80 (“[Defendants] undermined long established [sic] rights and sabotaged the
 23 judicial process itself by de-emphasizing the importance of, and eventually eliminating,
 ‘troublesome’ documentation requirements.”); *id.* at ¶ 94 (“The conspirators intended to maintain
 24 an absolute stranglehold on the American economy for many decades, if not centuries into the
 future.”).

25 ⁵⁸ See *Blake v. Dierdorff*, 856 F.2d 1365, 1368 (9th Cir. 1988) (applying Rule 9(b) to RICO claim
 26 based on fraud); see also *Occupational-Urgent*, 711 F. Supp. at 1021 (noting Rule 9(b) applies to
 RICO claims based on fraud).

27 ⁵⁹ *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

28 ⁶⁰ Docket No. 1-1 at ¶ 83.

1 thereby “contribut[ed] to the foreclosure crisis.”⁶¹ These allegations do not suffice to meet the
 2 particularity necessary to allege successfully a claim of fraud. And so, to the extent that the Patels
 3 allege a violation of Section 1962(a), their claim fails.

4 Their attempt to allege a Section 1962(d) claim likewise fails. The Patels assert
 5 conclusorily that Defendants conspired to steal real property through illegal foreclosure liens,⁶² but
 6 the actual facts they allege do not support that claim. They assert that various
 7 “securitizers/underwriters,” “bankers,” and Defendants essentially agreed to undermine the
 8 traditional mortgage and lending system through the securitization of loans and a failure to abide
 9 by traditional recording mechanisms.⁶³ But these actions do not coincide with any of the listed
 10 predicate activities under Section 1961(a), which is required to state a RICO claim. Even assuming
 11 that the allegations could support some kind of mail fraud claim against Defendants, nothing in the
 12 Patels’ allegations supports that Defendants and any of the unnamed co-conspirators agreed to
 13 engage in the fraud.⁶⁴

16 **H. Unfair and Deceptive Business Practices**

17 The Patels bring their Cal. Bus. and Prof. Code § 17200 claim as a “derivative cause of
 18 action” based on Defendants’ violations of Section 2924. Even if Section 2924 supports their
 19 claim for wrongful foreclosure, their Section 17200 claim fails because they have not asserted the
 20 requisite harm. They allege that because of Defendants’ unfair business practices, “a cloud has
 21 been placed on Plaintiff’s title and [his] interest in the Subject Property has been placed in

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⁶¹ *Id.* at ¶ 73.

⁶² *See id.* at ¶ 82.

⁶³ *See id.* at ¶¶ 83-91.

⁶⁴ *See, e.g., id.* at 83 (alleging false documents were sent through the mail but not alleging any agreement to do so).

1 jeopardy.”⁶⁵ But Section 17204 requires plaintiffs to establish that they have suffered an “injury in
 2 fact and ha[ve] lost money or property as a result of the unfair competition.”⁶⁶ Because the Patels
 3 have not alleged that they lost either money or property as a result of Defendants’ actions, other
 4 than what they owe on the loan, their claim fails.

5 **I. Motion to Expunge**

6 Defendants also request that the Patels’ lis pendens, which they recorded in Monterey
 7 County after initiating this suit, be expunged.⁶⁷ The court must look to California law when
 8 determining the propriety of expunging a lis pendens.⁶⁸ Cal. Code of Civ. P. § 405.20 states that
 9 “[a] party to an action who asserts a real property claim may record a notice of pendency of action
 10 in which that real property claim is alleged.” But “[a]t any time after notice of pendency of action
 11 has been recorded, any party . . . may apply to the court in which the action is pending to expunge
 12 the notice.”⁶⁹ “[T]he court shall order that the notice be expunged if the court finds that the
 13 claimant has not established by a preponderance of the evidence the probable validity of the real
 14 property claim.”⁷⁰ The court must engage in a two-step process by first determining whether any
 15 of the claims involve “real property” and second whether any of the claims are probably viable.⁷¹
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 21 ⁶⁵ *Id.* at ¶107.

22 ⁶⁶ See *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009).

23 ⁶⁷ See Docket No. 11.

24 ⁶⁸ See 28 U.S.C. § 1964.

25 ⁶⁹ Cal. Code Civ. P. § 405.30.

26 ⁷⁰ *Id.* § 405.32.

27 ⁷¹ See *Christiansen v. Wells Fargo Bank*, Case No. C 12-02526 DMR, 2012 WL 4716977, at *10
 28 (N.D. Cal. Oct. 1, 2012).

1 “The party who recorded the notice of lis pendens bears the burden of proof in opposing
 2 expungement.”⁷²

3 Defendants assert that because the Patels have failed to state any cause of action
 4 sufficiently, the lis pendens should be expunged. The court has determined, however, that the
 5 wrongful foreclosure claim passes muster, and since the wrongful foreclosure action “is a claim
 6 which would affect the title to, or right of possession of, the property at issue”⁷³ it suffices as a
 7 “real property claim.”⁷⁴ Even though the first prong may be satisfied, however, the Patels have not
 8 made a sufficient showing under the second prong. They have not offered any evidence, and in
 9 fact offer only the allegations in their complaint, to show that their wrongful foreclosure claim is
 10 “probably viable.”⁷⁵ Because the Patels have not offered evidence to show by a preponderance of
 11 the evidence that their cause of action is viable, the court GRANTS Defendants’ motion to expunge
 12 the lis pendens.

14 IV. CONCLUSION

15 The court dismisses all claims save for the wrongful foreclosure cause of action and finds
 16 the Patels have not met their burden to avoid expunging the lis pendens on the property. Because
 17 this is the Patels’ first complaint, the court finds that leave to amend is appropriate.⁷⁶ The Patels
 18 therefore may file an amended complaint within fourteen days.

21 ⁷² *Sencion v. Saxon Mortg. Servs., Inc.*, Case No. C 10-3108 SBA, 2012 WL 1355691, at *4 (N.D.
 22 Cal. Apr. 17, 2012).

23 ⁷³ *Id.*; see also Cal. Code Civ. Proc. § 405.4 (“Real property claim’ means the cause or causes of
 24 action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of,
 25 specific real property.”).

26 ⁷⁴ *Id.*

27 ⁷⁵ See *Hunting World, Inc. v. Super. Ct.*, 22 Cal. App. 4th 67, 70 (1994) (“Good faith and a proper
 28 purpose are no longer sufficient to maintain notice of lis pendens. The claimant must show a
 29 probably valid claim.”).

30 ⁷⁶ See Fed. R. Civ. P. 15(a); *Eminence Capital, LLC v. Asopeon, Inc.*, 316 F.3d 1048, 1052 (9th
 31 Cir. 2003).

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IT IS SO ORDERED.

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Dated: July 16, 2013

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PAUL S. GREWAL
United States Magistrate Judge